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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

Estate of GUADALUPE OCHOA, Deceased.	
ALEJA OCHOA et al., Objectors and Appellants, v. BLANCA ESTELA ELISEA VALENCIA et al., Petitioners and Respondents.	A150018 (San Francisco City and County Super. Ct. No. PES-15-298483)

This is a dispute over inheritance rights between the statutory heirs of the decedent and siblings of the decedent's predeceased spouse. Pursuant to the pertinent statute governing intestate succession, the trial court rejected the siblings' claims to a share of the estate and ordered the estate distributed to the decedent's heirs. The siblings of the predeceased spouse appeal, contending the court misapplied the statute. We affirm the judgment. However, as the court erred in denying respondents authority to retain an attorney to represent them on appeal and respondents are entitled to attorney fees in defense of the appeal, we remand for determination of such fees.

BACKGROUND

Decedent Guadalupe Ochoa died intestate on December 21, 2014. She was predeceased by her husband, Joaquin Ochoa-Torres, who died on April 17, 2008, also intestate. The couple had purchased a residence in San Francisco in 1986, where they

lived together until the predeceased spouse's death and decedent continued to live thereafter until she was moved to a nursing home prior to her death. In 2013, the San Francisco Public Guardian filed an action to recover the property from a third party to whom it had been fraudulently conveyed, and in March 2014, pursuant to the probate court's order, the real property was sold by the Public Guardian for $426,000. The proceeds were deposited into a conservator account to pay the decedent's living expenses.

After the decedent's death, $432,000 was deposited into an estate account, derived mainly from the proceeds of the real property sale. Respondents, the decedent's niece and nephew, were appointed co-administrators of the estate. They filed a petition to determine distribution rights (Prob. Code, § 11700),[1] naming 26 relatives entitled to intestate shares of the estate as decedent's heirs; additional heirs of the decedent were subsequently identified and added in an amended petition.[2] Appellants, four siblings of the predeceased spouse, filed an objection. Appellants claimed they were entitled to inherit half the estate pursuant to section 6402.5, because the real property, when sold, was the community property of the decedent and her predeceased spouse.

Section 6402.5 provides that where there is no surviving spouse or issue of the decedent, issue of the predeceased spouse, or parent of the predeceased spouse, but the decedent is survived by siblings of the predeceased spouse, those siblings inherit "the portion of the decedent's estate attributable to the decedent's predeceased spouse" if, for real property, the predeceased spouse died not more than 15 years before the decedent. (§ 6402.5, subd. (a).) For personal property, the siblings of the predeceased spouse inherit in these circumstances if the predeceased spouse died not more than five years before the decedent. (§ 6402.5, subd. (b).)

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[1] All subsequent statutory references are to the Probate Code unless otherwise indicated.

[2] These heirs are a brother of the decedent and the children and/or grandchildren of six siblings of the decedent who predeceased her.

The probate court concluded that the estate consisted entirely of personal property and, because the predeceased spouse died more than five years before the decedent, appellants were not entitled to any share of the decedent's estate. Appellants filed a motion for reconsideration, which the probate court denied. This appeal followed.

DISCUSSION

Section 6402.5 governs the distribution of the estate of an intestate decedent who had a predeceased spouse and leaves no surviving spouse or issue. In these circumstances, the statute directs that "the portion of the estate attributable to the decedent's predeceased spouse" (as relevant here, half the community property existing at the time of the predeceased spouse's death) pass to the surviving issue of the predeceased, if any; if none, to the surviving parent or parents of the predeceased spouse, if any; and, if none, to the surviving issue of the parents of the predeceased spouse. (§ 6402.5, subd. (a), (b).) The statute distinguishes, however, between real property and personal property: Real property in the decedent's estate passes as described "if the decedent had a predeceased spouse who died not more than 15 years before the decedent," but personal property in the estate passes in this manner "if the decedent had a predeceased spouse who died not more than five years before the decedent."[3]

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[3] Section 6402.5 provides as follows:

"(a) For purposes of distributing real property under this section if the decedent had a predeceased spouse who died not more than 15 years before the decedent and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

"(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse . . . .

"(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.

"(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them . . . . [¶] . . . [¶]

In the present case, the decedent died six years and eight months after the death of her predeceased spouse. Accordingly, appellants would be entitled to the predeceased spouse's share of the community property if it was real property but not if it was personal property.

Appellants assert that the fact the real property in this case was "sold and converted to personal property of the decedent on the date of sale does not affect the rights of the predeceased spouse's heirs at law to receive one-half of the community property as long as the decedent died within 15 years of the predeceased spouse's death because the community property asset at the time of death of the predeceased spouse was

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"(b) For purposes of distributing personal property under this section if the decedent had a predeceased spouse who died not more than five years before the decedent, and there is no surviving spouse or issue of the decedent, the portion of the decedent's estate attributable to the decedent's predeceased spouse passes as follows:

"(1) If the decedent is survived by issue of the predeceased spouse, to the surviving issue of the predeceased spouse . . . .

"(2) If there is no surviving issue of the predeceased spouse but the decedent is survived by a parent or parents of the predeceased spouse, to the predeceased spouse's surviving parent or parents equally.

"(3) If there is no surviving issue or parent of the predeceased spouse but the decedent is survived by issue of a parent of the predeceased spouse, to the surviving issue of the parents of the predeceased spouse or either of them . . . . [¶] . . . [¶]

"(f) . . . the 'portion of the decedent's estate attributable to the decedent's predeceased spouse' means all of the following property in the decedent's estate:

"(1) One-half of the community property in existence at the time of the death of the predeceased spouse.

"(2) One-half of any community property, in existence at the time of death of the predeceased spouse, which was given to the decedent by the predeceased spouse by way of gift, descent, or devise.

"(3) That portion of any community property in which the predeceased spouse had any incident of ownership and which vested in the decedent upon the death of the predeceased spouse by right of survivorship.

"(4) Any separate property of the predeceased spouse which came to the decedent by gift, descent, or devise of the predeceased spouse or which vested in the decedent upon the death of the predeceased spouse by right of survivorship." (§ 6402.5.)

real property not personal property." According to appellants, "the language of section 6402.5" requires examination of the property of the predeceased spouse at the time of his or her death, and if at that time there was community real property, the predeceased spouse's heirs "are entitled to an expectation of inheritance for 15 years after the death of the predeceased spouse." In effect, the argument is that when a surviving spouse sells community real property, section 6402.5 requires the proceeds of the sale to be treated as "real property" if the surviving spouse dies within 15 years of the first spouse, and the predeceased spouse's relatives cannot be deprived of this longer time frame applicable to real property by the surviving spouse's decision to sell the property.

The foundation of appellants' argument is the historical point that section 6402.5 (like former sections 228 and 229, from which it was derived) is based on the "feudal doctrine of descent of ancestral property," which focuses on the origin or source of acquisition of the property in determining intestate distribution. Appellants note the discussion of the history of the statutory scheme in *Estate of Rattray* (1939) 13 Cal.2d 702, 713 (*Rattray*): "It is apparent from the history of these code provisions and the various changes therein that ever since the amendment in 1905, wherein the origin or source of the property was first set up as one of the determining factors in the descent and distribution of the estate of a decedent dying intestate without issue, that there has been a consistent attempt to work out a reasonable, consistent scheme of distribution wherein upon the death of a decedent intestate without issue, instead of the whole property going to the relatives of the last surviving spouse, the property should go back to the relatives of the spouse from which title was derived. The scheme in general, as was fair and reasonable, provided that the separate property of a predeceased spouse should go back in its entirety to the relatives of said predeceased spouse, and that the community property of the spouses should be shared equally by the relatives of the predeceased spouse and the relatives of the surviving spouse since both spouses are deemed to have contributed equally to its acquisition. (*Estate of Brady* [(1915)] 171 Cal. 1; *Estate of McArthur* [(1930) 210 Cal. 439]; *Estate of Putnam* [(1933)] 219 Cal. 608.)"

Appellants acknowledge that the community property existing at the time of the predeceased spouse's death can be "dissipated" by the surviving spouse, but maintain that "the actions of the surviving spouse after the death of the predeceased spouse does not transmute and convert the nature of the property to limit the rights of the predeceased spouse's heir at law." The caselaw they cite supports the proposition that, for purposes of distribution upon the death of a surviving spouse, the character of property *as community or separate* is not altered by the surviving spouse's conversion of one form of property into another by sale or exchange. (*Estate of Brady, supra*, 171 Cal. at pp. 4–5 (*Brady*).) But these cases do not address the question presented here, because, unlike section 6402.5, the statutes interpreted in these cases—former sections 228 and 229, and their predecessor, former section 1386—did not distinguish between real and personal property or contain temporal limits on their application. Prior to section 6402.5, regardless of the form of property in an intestate decedent's estate and length of time since the death of a predeceased spouse, the question was whether any of the property could be traced to community or separate property of the predeceased spouse.[4]

Section 6402.5 added express limitations on its operation. Subdivision (a) applies "*[f]or purposes of distributing real property* under this section if the decedent had a predeceased spouse who died not more than 15 years before the decedent" and subdivision (b) applies "*[f]or purposes of distributing personal property* under this section if the decedent had a predeceased spouse who died not more than five years before the decedent." (§ 6402.5 subd. (a) & (b), italics added.) Appellants omit any reference to this critical limiting language, and their claim that the statute does not "address what happens" if property of one form at the death of the first spouse is converted to a different form by the surviving spouse ignores the obvious import of the

[4] Respondents, to bolster their argument that the proceeds of a sale of real property are personal property for purposes of distribution under section 6402.5, incorrectly attribute to the *Rattray* court the statement that "at common law and in states with ancestral property laws, the sale or exchange of land extinguishes its ancestral character." The quoted statement was made by the *dissent* in *Rattray.* (*Rattray, supra,* 13 Cal.2d at p. 720, dis. opn. of Edmonds, J.)

statutory language. The plain terms of the statute require the court to distinguish between real and personal property in the decedent's estate at the time of the decedent's death. "For purposes of distribution of real property" and "for purposes of distribution of personal property" are directions for distribution of the existing estate, and once real property has been sold, the estate contains no real property to be distributed pursuant to subdivision (a) of section 6402.5.

Appellants' focus on the historical origin of the statutes governing intestate distribution goes only so far. As they acknowledge, the statutes do not restrict a surviving spouse's use or disposition, during his or her lifetime, of property that was held as community property with a predeceased spouse. (*Estate of McArthur, supra,* 210 Cal. at p. 444; *Brady, supra,* 171 Cal. at p. 6.)[5] "The rights of the in-law heirs following the death of the first spouse are merely an expectancy, since the surviving spouse is absolute owner and can dispose of the property in his lifetime or by will." (*Estate of Nereson* (1987) 194 Cal.App.3d 865, 869; *Brady,* at p. 5.) Even under the former versions of the intestate succession statutes, the surviving spouse was not precluded from entirely denying the predeceased spouse's relatives a share of the former community property; the statutes simply ensured that where former community property remained in the estate at the time of the decedent's death, the predeceased spouse's share would go to his or her relatives rather than the decedent's.[6] Section 6402.5 specifically altered the historical framework by limiting a predeceased spouse's relatives' "expectancy" in property (*Brady,* at p. 5) to a specific period after that spouse's death—15 years in the case of real property remaining in the estate and five years for personal property.

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[5] Appellants' statement that "[t]he surviving spouse cannot purchase new real property after the death of the predeceased spouse unless the real property is purchased with community property assets" is incorrect, not supported by the cases they cite, and inapposite to any issue in the case.

[6] This statement of the rule is subject to the qualification (not applicable in the present case) that the surviving spouse's heirs may be entitled to a greater share where the value of former community property has increased due to the personal efforts of or infusions of cash from the surviving spouse after the first spouse's death. (*Estate of Nereson, supra,* 194 Cal.App.3d at p. 868; *Brady, supra,* 171 Cal. at p. 7.)

Appellants' interpretation defies the express terms of the statute. Appellants are correct that the character of property *as community or separate* is made as of the death of the predeceased spouse, and proceeds from the sale of community real property remain community property. But section 6402.5 directs distribution of the decedent's estate to be governed by the form of the property—real or personal—at the time of the decedent's death.

II.

Respondents ask us to order that their attorneys be paid for their efforts in defending this appeal. The trial court's "Order Determining Distribution Rights" was filed on June 2, 2016, and its order denying appellants' motion for reconsideration was filed on September 14, 2016. Appellants filed their notice of appeal on September 21, 2016, and their opening brief on March 13, 2018.

On July 17, 2018, respondents filed in the trial court a "Petition for Authority to Participate in Proceedings to Determine Heirship, Retain Counsel, Enter into Fee Agreement and Pay Attorney (San Francisco Local Rules of Court Section 14.14J, . . . § 10811, 11704(b))," [7] explaining that they sought to defend the trial court's order on appeal and retain counsel to represent them in so doing. [8] An August 8, 2018, entry in the

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[7] The Superior Court of San Francisco County, Local Rules, rule 14.14 J provides:

"Where a conservator or guardian of the estate, personal representative, special administrator, temporary conservator or guardian of the estate, trustee of a trust related to a conservatorship, or guardian ad litem seeks to retain litigation counsel, a petition for authority to enter into a fee agreement with litigation counsel may be presented to the Probate Department ex parte. The proposed fee agreement must be attached to the petition. Proposed contingency fee agreements will not be considered ex parte."

Section 10811 gives the court discretion to allow additional compensation for extraordinary services by the attorney for the personal representative.

Section 11704, subdivision (b), provides: The personal representative may petition the court for authorization to participate, as necessary to assist the court, in the proceeding."

[8] Respondents state that an ex parte order to retain counsel had already been signed, but no such order appears in the record.

Register of Actions reads: "Court stated that the Co-Administrators can go ahead and participate in opposing the appeal if they want to, and questions whether it is appropriate for the Estate to pay for it and whether or not it is for the Co-Administrator's personal benefit as they are Beneficiaries." The court denied the petition on September 5, 2018, without further explanation. Respondents' filed their brief on this appeal in December 2018.

The Probate Code provides that the personal representative may "[c]ommence and maintain actions and proceedings for the benefit of the estate" and "[d]efend actions and proceedings against the decedent, the personal representative, or the estate." (§ 9820.) These powers "may be exercised by the personal representative without court authorization, instruction, approval, or confirmation," although "[n]othing in this section precludes the personal representative from seeking court authorization, instructions, approval, or confirmation." (§ 9610.) "A probate court must order compensation out of estate assets for routine probate services rendered by an executor's attorney. (Prob. Code, §§ 10800, 10810.) Services that are not involved in the typical probate case, commonly known as 'extraordinary services,' may be paid out of estate assets at the discretion of the probate court. (*Estate of Hilton* (1996) 44 Cal.App.4th 890, 894–895; Prob. Code, § 10811.) Attorneys' fees that are properly considered an expense of administration, whether routine or extraordinary, are payable only out of the estate and are not a personal charge against the executor. The attorneys' sole remedy must be obtained from the probate court. (*Hatch v. Bush* [(1963)] 215 Cal.App.2d [692,] 705.)" (*Miller v. Campbell, Warburton, Fitzsimmons, Smith, Mendel & Pastore* (2008) 162 Cal.App.4th 1331, 1339–1340 (*Miller*).)[9]

Respondents argue that they should be able to defend the lower court's ruling on appeal just as they defended the rights of the decedent's legal heirs to the estate against appellants' claims. As respondents protected the rights of all the beneficiaries, not just

[9] The *Miller* court noted that it used the terms "executor" and "personal representative" interchangeably. (*Miller, supra*, 162 Cal.App.4th at p. 1339, fn. 2.)

their own, they maintain they are entitled to have their attorneys' fees paid from the estate pursuant to the common fund doctrine. This doctrine provides that " 'when a number of persons are entitled in common to a specific fund, and an action brought by a plaintiff or plaintiffs for the benefit of all results in the creation or preservation of that fund, such plaintiff or plaintiffs may be awarded attorney's fees out of the fund.' " (*Serrano v. Priest* (1977) 20 Cal.3d 25, 34.) "The purpose of the doctrine is to allow a party, who has paid for counsel to prosecute a lawsuit that creates a fund from which others will benefit, to require those other beneficiaries to bear their fair share of the litigation costs." (*Northwest Energetic Services, LLC v. California Franchise Tax Bd.* (2008) 159 Cal.App.4th 841, 878.) It allows the plaintiffs' attorneys to be paid from the fund, so that "*all* of the beneficiaries of the fund pay their share of the expense necessary to make it available to them." (*Winslow v. Harold G. Ferguson Corp.* (1944) 25 Cal.2d 274, 277.) "The bases of the equitable rule which permits surcharging a common fund with the expenses of its protection or recovery, including counsel fees, appear to be these: fairness to the successful litigant, who might otherwise receive no benefit because his recovery might be consumed by the expenses; correlative prevention of an unfair advantage to the others who are entitled to share in the fund and who should bear their share of the burden of its recovery; encouragement of the attorney for the successful litigant, who will be more willing to undertake and diligently prosecute proper litigation for the protection or recovery of the fund if he is assured that he will be promptly and directly compensated should his efforts be successful." (*Estate of Stauffer* (1959) 53 Cal.2d 124, 132 (*Stauffer*).)

The common fund doctrine does not apply where the fund will not substantially benefit anyone other than the litigating parties (*Estate of Gump* (1982) 128 Cal.App.3d 111, 118 [attorneys represented five of the six beneficiaries, sixth would receive no more than 11 percent interest]) or where substantially all the beneficiaries of the fund are represented by counsel (*Estate of Korthe* (1970) 9 Cal.App.3d 572, 575–576). Here, however, the circumstances appear to satisfy the purposes of the doctrine: Respondents in the trial court defended against objections to distribution of the estate that would have

reduced the total inheritance due to the decedent's heirs by close to half, and their defense on appeal sought to protect the estate for the benefit of those heirs. That respondents themselves were beneficiaries does not alter the fact that the litigation they maintained was for the benefit of the many others who did not participate as litigants.

Furthermore, as the *Stauffer* court noted, "where, as here, the attorneys who recover estate property are employed by the personal representative, there is no occasion to invoke these equitable considerations in order to make the attorneys' fee payable from the estate; by probate law the fee is so payable as an expense of administration." (*Stauffer, supra,* 53 Cal.2d at p. 132.) Again, a personal representative "may not look to the estate to compensate an attorney who has represented her in her individual capacity" (*Miller, supra,* 162 Cal.App.4th at p. 1340 [fees for representation of executor against challenge by other beneficiaries to executor's share of estate]; *Estate of Fritz* (1936) 16 Cal.App.2d 519, 520 [no fees for appeal prosecuted by executor from which no one other than executor could have benefitted]), but that is not the situation here.

The trial court erred in denying respondents' authority to retain an attorney to represent them on appeal. They are entitled to have the attorney fees incurred in defense of the appeal paid by the estate. The matter shall be remanded for determination of the amount of such fees.

DISPOSITION

The order determining distribution rights is affirmed.

The matter is remanded to the trial court for determination of the amount of attorney fees to be paid by the estate.

Costs to respondents.

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Kline, P.J.

We concur:

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Stewart, J.

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Miller, J.

Estate of Ochoa, Deceased (A150018)